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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)	
)	
Amendment of Part 90 of the)	PR Docket No. 89-552
Commission's Rules to Provide)	
for the Use of the 220-222 MHz Band)	
by the Private Land Mobile)	
Radio Service)	
)	
Implementation of Sections 3(n) and 332)	GN Docket No. 93-252
of the Communications Act)	
)	
Regulatory Treatment of Mobile Services)	
)	
To: The Commission		

**PETITION FOR CLARIFICATION AND/OR RECONSIDERATION
OF SMR ADVISORY GROUP, L.C.**

SMR Advisory Group, L.C. ("SMR Advisory"), by its counsel and pursuant to Section 1.429 of the Commission's Rules, hereby submits this petition for clarification and/or reconsideration of the Federal Communications Commission's ("FCC" or "Commission") Second Report and Order, released January 26, 1996 in the above-captioned proceeding.¹ In the 220 MHz Modification Order, the Commission adopted rules to govern the filing and processing of modifications to the authorizations of existing 220 MHz licensees, also known as "Phase I Licensees." The Commission action here lifts, in part, a five-year freeze that has prevented existing licensees from obtaining any modifications to their authorized facilities and which had been a major obstacle to the development of the 220 MHz industry.

¹ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 Mhz Band by the Private Land Mobile Radio Service, Second Report and Order, PR Docket No. 89-552, GN Docket 93-252, released January 26, 1996 ("220 MHz Modification Order").

Pursuant to the 220 MHz Modification Order, Phase I Licensees currently located within a Designated Filing Area ("DFA") will be permitted to relocate their base stations up to one-half the distance over 120 kilometers toward any authorized co-channel base station, to a maximum distance of 8 km.² Phase I Licensees currently located outside the boundaries of any DFA will be permitted to relocate their base stations up to one-half the distance over 120 km toward any authorized co-channel base station, to a maximum distance of 25 km, so long as they do not locate their base station more than 8 km inside the boundaries of any DFA.³ The 220 MHz Modification Order further provides that any Phase I Licensee that has been granted special temporary authority ("STA") to operate at an alternative site, and certifies that, as of January 26, 1996, (i) it has constructed its base station and has placed it in operation or commenced service at that site, or (ii) it has taken delivery of the base station transceiver, will be permitted to seek permanent authorization at that site notwithstanding the distance limitations adopted by the Commission for other modifications.⁴

² 220 MHz Modification Order at ¶ 1.

³ 220 MHz Modification Order at ¶ 1. In addition, a Phase I Licensee will be permitted to relocate its base station less than 120 km from the base station of a co-channel licensee or more than one half the distance over 120 km from the base station of a co-channel licensee only with the consent of that licensee. Id.

⁴ 220 MHz Modification Order at ¶ 15-16. Any Phase I Licensee seeking to modify its site in accordance with such an STA must ensure, however, that it complies with all technical and operational rules applicable to 220 MHz authorizations. Id. at ¶ 16. All Phase I Licensees constructing at their original sites must have completed construction as of March 11, 1996. Existing licenses seeking to relocate their sites must (i) file a letter of intent advising the Commission of their intent to relocate as of March 11, 1996 (if the modification application has not been filed as of that date); (ii) file a modification application by no later than May 1, 1996; and (assuming the modification application is grantable within the parameters of the 220 MHz Modification Order) (iii) construct the modified system at the relocated site by not later than August 15, 1996. 220 MHz Modification Order at ¶ 29.

While SMR Advisory is appreciative of the Commission's effort to provide relief to Phase I Licensees that have struggled to develop competitive wireless systems in the face of significant regulatory obstacles, there are several issues arising from the 220 MHz Modification Order that require immediate reconsideration and/or clarification, particularly in light of the tight deadlines adopted by the Commission for modifications.

First, the Commission should reconsider its exclusion of modifications which do not include a relocation of the originally authorized site;

Second, the Commission should clarify that Phase I Licensees who filed applications for special temporary authority as of January 26 but did not receive grants of those applications until shortly thereafter, would qualify for the same relief as those licensees receiving STA grants dated as of January 26, 1996, provided, of course, that such licensees also had taken delivery of their equipment as of January 26, 1996; and

Third, the Commission should reconsider its decision to preclude a Phase I licensee whose originally authorized coordinates are located within a DFA from seeking to move to a location outside the DFA that is more than 8 km from the original coordinates.

For the reasons below, SMR Advisory respectfully requests that the Commission act promptly to address and resolve these issues as indicated in order that Phase I Licensees have adequate information and sufficient time to modify their systems.

I.

DISCUSSION

A. **The Commission Must Permit Phase I Licensees To File Non-Relocation Modifications.**

The Commission's decision to limit Phase I Licensees only to modifications that relocate their originally authorized site coordinates would discriminate unfairly against

those licensees prepared to remain at their original locations, but who need to modify certain specifications (technical or otherwise) of their original site license. Moreover, because these licensees will likely be protected by Phase II licensees based on contours derived from maximum power and height specifications, there is no public interest to exclude such modifications from the process adopted by the Commission in its 220 MHz Modification Order.

When the Commission imposed a freeze on applications and modifications shortly after the initial filing window opened in May 1991, those applicants (and later licensees) naturally anticipated that, as was the case with licensees in the other wireless services, they also would have the opportunity to make routine changes to their licensed facilities, including changes to relocate their sites or to adjust power levels or antenna heights at their original sites. Clearly, the emphasis in this proceeding has been on the need for licensees to be permitted to relocate in light of changed circumstances as to site availability since 1991, and the fact that the Commission has provided relief to these licenses is commendable. Those licensees seeking to make changes to their original site locations, however, are equally in need of the opportunity to modify their licenses. Certainly, these licensees cannot be expected to have foreseen in 1991 that they would be strictly restricted to the specifications on their original licenses and would never be given the opportunity to change those specifications. To continue to restrict these licensees from modifying their licenses, therefore, is both unfair and contrary to the public interest.

What makes the decision to exclude modifications to original sites even more egregious is the fact that many of the licensees seeking such modifications already are providing service to the public pursuant to STAs which have authorized these changes.⁵ Moreover, the Commission's rationale that it was "not appropriate" to force licensees who have constructed their systems at relocated sites pursuant to STAs to discontinue such service, applies equally to licensees who have constructed at their original sites and obtained STAs to operate with different technical parameters (such as increased height or power).⁶ If these licensees are forced to curtail the service already being provided to the public, the Commission would be encouraging the very result it intended to prevent with its STA relief.⁷

The exclusion of modifications for reasons other than relocation also is directly contrary to the Commission's stated goal in this rulemaking, which is to enhance the competitive potential of 220 MHz services in the commercial mobile radio service marketplace.⁸ Existing licensees forced either to change existing operations or to settle for inferior technical specifications at original sites would be less able to compete with

⁵ Among the licenses managed by SMR Advisory, for example, approximately fifteen (15) systems have been constructed pursuant to STAs which have authorized changes to the technical parameters to the stations located at original site coordinates.

⁶ 220 MHz Modification Order, at ¶ 15.

⁷ Indeed, the 220 MHz Modification Order, as it currently reads, would actually encourage licensees to relocate in order to obtain more favorable height and power specifications, when there actually is no need to relocate. The resulting increased administrative burdens associated with such moves could easily be avoided simply by permitting all Phase I Licensees a fair opportunity to make modifications to their original sites.

⁸ 220 MHz Modification Order at ¶ 4 and Appendix B.

other commercial mobile services. And there is no harm to future licensees since the Commission is likely to adopt a protected service area for incumbent Phase I Licensees using maximum power and antenna height in any event.⁹ Accordingly, the Commission should reconsider its decision to exclude such modifications from the procedures adopted in its 220 MHz Modification Order and permit Phase I Licensees to file permanent modifications to their original facilities reflecting all necessary changes, including increases in their height and antenna specifications up to maximum permitted values.¹⁰

B. The Commission Should Clarify That Licensees With STAs Filed As Of January 26, 1996 But Granted Thereafter Are Entitled To The Same Relief Provided To Licenses With STAs Granted As Of January 26, 1996.

Section 90.753(c) of the Commission's Rules provides that a Phase I Licensee "that has been granted Special Temporary Authority (STA) to operate at an alternative base station" may modify its authorization without regard to the distance limitations imposed by the Commission; provided that the licensee certifies that, as of January 26, 1996, it has either constructed its station and placed in it operation (or commenced

⁹ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 Mhz Band by the Private Land Mobile Radio Service, Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, PR Docket No. 89-552, RM-8506, GN Docket 93-252, PP Docket No. 93-253, released August 28, 1996 at ¶ 99 ("Third Notice"). See also "Reply Comments of the American Mobile Telecommunications Association," with respect to the Third Notice, filed on October 12, 1995.

¹⁰ At the very least, Phase I Licensees currently operating pursuant to STAs which change specifications to their original sites should be assured that those STAs will remain in effect pending a formal change to the rules on this matter. Moreover, Phase I Licensees who will remain at their original sites and be constructed as of March 11, 1996, should be permitted to file for and obtain STAs on a prospective basis to implement changes to their original sites.

service), or taken delivery of its base station transceiver. While this rule clearly states that construction or delivery of the equipment must have occurred on or before January 26, 1996, the rule does not indicate any similar qualifications as to the timing of the grant of the STA.¹¹ In light of the ambiguity on this issue, SMR Advisory requests that the Commission clarify that Section 90.753(c) does not require that the STA request be granted as of January 26, 1996. A plain reading of the rule nowhere imposes the requirement that the STA grant must have occurred as of such date. Nor does the language in the 220 MHz Modification Order itself provide further clarification of the Commission's intent.¹²

¹¹ An informal request for clarification on this issue was made to the Wireless Telecommunications Bureau (the "Bureau") in an effort to resolve this ambiguity. The request stated that it was understood that licensees with granted STAs who had constructed or taken delivery of their base transceivers on January 26, 1996 would be permitted to seek permanent authorization at the STA location if the STA was filed by and pending on January 26, 1996. See Letter from Alan R. Shark, President and Chief Executive Officer of American Mobile Telecommunications Association to Michele C. Farquhar, Acting Chief, Wireless Telecommunications Bureau, dated February 15, 1996. In response, the FCC staff expressed their belief that the 220 MHz Modification Order excluded all pending requests for STA that were not granted as of January 26, 1996. See Letter from John Cimko, Chief, Policy Division, Wireless Telecommunications Bureau to Alan R. Shark, President and Chief Executive Officer, American Mobile Telecommunications Association, dated February 28, 1996.

¹² 220 MHz Modification Order at ¶ 15. The Commission states on this issue that "any licensee that has been granted an STA to operate at an alternative site and certifies, in accordance with the requirements of this Order, that it has constructed its base station and has placed it in operation, or commenced service at that site by the adoption date of this Order, will be permitted to seek modification" (Emphasis added). As can be seen, the qualifier "by the adoption date of this Order," can reasonably be construed to apply only to the construction or delivery timetable of the licensee. This reading is borne out by the language of Section 90.753(c) itself, which includes the date reference only with respect to the construction and delivery conditions.

There is no rational basis for distinguishing between those licensees who had filed an STA as of January 26, 1996 and those who had received a grant of an STA as of January 26, so long as both group of licensees took the necessary business steps to begin operations at that site by constructing or taking delivery of equipment by January 26, 1996. If both groups of licensees had filed requests for STAs by the adoption date of the order, once the requests were filed, none of the licensees had any control over when the STA actually would be granted. It is inherently unfair to make distinctions based on the Commission's processes when both groups of licensees had taken identical steps to implement their systems. Accordingly, the Commission should clarify that licensees with STAs that were filed as of January 26, 1996 and granted thereafter, are entitled to the same relief as that available to licensees whose STAs were granted as of January 26, provided that in either case, as of January 26, 1996, the licensee had constructed the system at the alternative site and initiated operations, or taken delivery of the equipment.

C. Licensees Moving From Within a DFA To A Location Outside a DFA Should Be Permitted to Move Up to 25 Kilometers Subject To The "Half The Distance Over 120 Kms From A Co-Channel Licensee" Test.

The 220 MHz Modification Order specifies that all modifications to relocate a station will be limited to no more than one half the distance over 120 kilometers toward a co-channel licensee's initially authorized base station.¹³ The maximum permitted move within a Designated Filing Area ("DFA") is eight (8) kilometers and

¹³ 220 MHz Modification Order at ¶ 9.

the maximum permitted move in an area outside a DFA is twenty-five (25) kilometers. If the move is from outside the DFA into the DFA, the move may be up to 25 kilometers as long as the move is no more than 8 kilometers inside the DFA.¹⁴ The Commission nowhere expressly addressed the limitations on moves from a location within the DFA to a location outside the DFA.

It would be consistent with the scheme proposed by the Commission if a licensee desiring to relocate from a location inside the DFA to a location outside the DFA would be permitted to move up to 25 kilometers, the same as any other licensee already outside the DFA. Licensees close to a DFA boundary moving outside the DFA into a more rural area are likely to face the same difficulties as a licensee already located outside a DFA in terms of finding alternate sites within a short distance. Therefore, it would not be inequitable to permit them to move a greater distance than a licensee which is to remain within the DFA. Moreover, to the extent that a licensee is moving away from the more populated -- and presumably more valuable -- area, there would be no adverse effect on the interests of entities likely to be participating in the auction for Phase II 220 MHz licenses. Accordingly, SMR Advisory requests that the Commission reconsider and/or clarify its policy in this regard to permit moves up to 25 km from a location within a DFA to a location outside that DFA; provided that all other specified requirements have been met.

¹⁴ Id.

II.

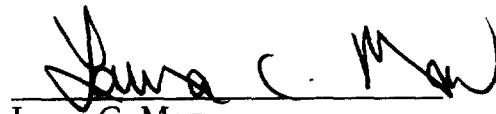
CONCLUSION

For the reasons stated above, the Commission should permit Phase I Licensees to file modifications other than relocations. The Commission should clarify that licensees with STAs pending on January 26, 1996 and ultimately granted should be permitted permanent authorizations at their STA sites without regard to the distance limitations set forth in the order, if they were either constructed or had taken delivery of their equipment by January 26, 1996. In addition, the Commission should permit licensees relocating from coordinates within a DFA to coordinates outside a DFA to move up to 25 kilometers, so long as they were moving no more than one half the distance over 120 kilometers toward a co-channel licensees's initially authorized base station.

Respectfully Submitted,

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